

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

FINJAN, INC.,
Plaintiff,

v.

PROOFPOINT, INC. and ARMORIZE
TECHNOLOGIES, INC.,
Defendants.

Case No. 3:13-cv-05808-HSG (HRL)

**ORDER RE DISCOVERY DISPUTE
JOINT REPORT NO. 3**

Re: Dkt. No. 185

At issue in Discovery Dispute Joint Report (DDJR) No. 3: (1) whether defendants should be compelled to produce Wayne Huang for a second day of deposition; (2) whether defendants should be compelled to produce witness(es) to testify about Topics 8 and 11-13 in plaintiff's third Fed. R. Civ. P. 30(b)(6) deposition notice; and (3) whether defendants should be compelled to serve supplemental responses to plaintiff's Interrogatories 14-15. The matter is deemed suitable for determination without oral argument. Civ. L.R. 7-1(b). Upon consideration of the parties' respective arguments, this court denies plaintiff's request for further discovery.

A. Huang's Deposition

This court is told that Huang is a co-founder, Chief Executive Officer, and Chief Technology Officer of defendant Armorize Technologies, as well as defendant Proofpoint, Inc.'s Vice President of Engineering. Defendants designated him to testify as a Fed. R. Civ. P. 30(b)(6) witness about a number of technical topics noticed by plaintiff Finjan, Inc. (Finjan).

1 Defendants say that Huang is a busy high-level executive based in Taiwan. For that
2 reason, they told Finjan that he would be produced for only a single day of deposition, not to
3 exceed seven hours. Finjan, however, reserved the right to depose him for more than one day,
4 given his role in defendants' business and the fact that he would be deposed both as an individual
5 and as a Fed. R. Civ. P. 30(b)(6) witness.

6 Huang was deposed here on August 11, 2015. Defendants say that the examination
7 exceeded seven hours, but do not say precisely how long Huang was deposed.¹

8 Finjan now argues that Huang must be produced for a second deposition. The reason:
9 According to plaintiff, on August 5, 2015 (about a week before Huang's deposition), defendants
10 produced 120,000 pages of documents, including detailed technical documents and Huang's
11 emails. Plaintiff says that, even after Huang was deposed, defendants continued to produce other
12 documents through mid-September,² and that defendants' August-September 2015 production
13 totaled about 700,000 pages of documents. Technical documents, says Finjan, should have been
14 produced in January of this year (pursuant to this court's order re DDJR No. 1). With respect to
15 the Huang emails, plaintiff said that its ESI (electronically stored information) requests were
16 narrowly tailored and complied with the court's ESI Order (Dkt.94). Finjan further claims that it
17 requested the Huang emails in April 2015; that all ESI search terms were finalized in May 2015;
18 and that there is no reason why defendants could not have produced the emails much sooner than
19 they did. Plaintiff asserts that defendants did not even begin processing emails for production
20 until June 2015 and that they initially searched the wrong databases.

21 According to defendants' version of events: They made the source code for the accused
22 products available for inspection over a year ago, but Finjan inspected it only a few times prior to
23 August 2015. Additionally, defendants claim that they also timely produced key internal technical
24 documents, including engineering wikis for accused products. Then, in January 2015, defendants
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26 ¹ This court assumes that if the examination went significantly over the seven-hour limit,
27 defendants would have said so. (They have not.)

28 ² The parties jointly requested, and obtained, an extension of the September 2 cutoff date to
complete certain discovery.

1 say that after a reasonable search, they produced several thousand pages of additional engineering
2 wiki pages and documents relating to their products and technology.

3 As for the Huang emails, defendants contend that plaintiff's ESI requests were overbroad
4 and included terms like "HackAlert," "Scan*," "Analyze*," and "Core*" that yielded over 60,000
5 hits. Finjan then reportedly responded by modifying its proposed search terms. Defendants say
6 that they continued to object that the terms were still too broad; nevertheless, on May 12, 2015
7 Finjan asked defendants to search for emails using those terms. And, although they reserved the
8 right to seek costs pursuant to the ESI order, defendants acquiesced. Defendants say that email
9 production began on June 26, 2015 and included over 110,000 documents and 925,000 pages of
10 custodial emails comprising full families of any email or attachment containing Finjan's search
11 terms. They deny Finjan's assertion that they searched the wrong databases; rather, defendants
12 claim that they first ran the search terms using the native Gmail search tool, and then found more
13 responsive emails by using a document collection platform. Additionally, defendants claim that
14 Finjan continued to narrow its ESI search terms for Huang as late as July 16.

15 Unless otherwise ordered by the court or stipulated by the parties, a deposition is
16 presumptively limited to one day of seven hours. Fed. R. Civ. P. 30(d)(1). Huang is entitled to
17 the presumptive seven-hour limit, even though he testified both individually and as a Fed. R. Civ.
18 P. 30(b)(6) witness; and, Finjan does not have "carte blanche to depose an individual for seven
19 hours as an individual and seven hours as a 30(b)(6) witness." Miller v. Waseca Med. Ctr., 205
20 F.R.D. 537, 540 (D. Minn. 2002). Determining whether a further examination of Huang is
21 warranted requires a specific factual inquiry. Id. "The court must allow additional time consistent
22 with Rule 26(b)(1) and (2) if needed to fairly examine the deponent or if the deponent, another
23 person, or any other circumstances impedes or delays the examination." Fed. R. Civ. P. 30(d)(1).

24 Arguing that it did not have time to sufficiently review the 120,000 pages of documents
25 produced the week before Huang's deposition, and noting that defendants continued to produce
26 documents even after Huang was deposed, Finjan says Huang must now be produced for a second
27 day of deposition. Finjan also points out that defendants' August-September 2015 production
28 includes detailed documents about certain source code components. However, Finjan has not

1 identified any documents without which it was prejudiced in preparing for or taking Huang's
 2 deposition. Moreover, the record indicates that Finjan had access to defendants' source code for
 3 over a year, as well as technical documents and a large portion of Huang's emails to prepare for
 4 his deposition. There is no suggestion that Huang was unprepared to testify. And, plaintiff has
 5 not identified any matters about which it was unable to examine Huang due to the timing of
 6 defendants' production. Finjan has not made a sufficient showing justifying another examination
 7 of Huang. Its request for an order compelling defendants to produce him for a second deposition
 8 is denied.

9 **B. Plaintiff's Third Fed. R. Civ. P. 30(b)(6) Deposition Notice**

10 Finjan requests an order compelling defendants to produce witness(es) to testify about
 11 Topics 8 and 11-13 in plaintiff's third Fed. R. Civ. P. 30(b)(6) notice. Topic 8 seeks testimony re
 12 "[i]dentification of the technologies in each of the accused instrumentalities from the date of first
 13 sale." Topics 11-13 seek testimony about the "conception, design, operation, and development" of
 14 certain source code components, and defendants say that those topics pertain to Proofpoint's
 15 Targeted Attack Protection product that Huang developed with other Armorize engineers. (DDJR
 16 3, Ex. 3).

17 Plaintiff's third Fed. R. Civ. P. 30(b)(6) deposition notice was served on August 18, 2015.
 18 Finjan says that Topics 8 and 11-13 were not "specified" in its earlier deposition notices because
 19 defendants did not timely provide discovery that would have allowed Finjan to identify these
 20 topics sooner. Reiterating that defendants produced hundreds of thousands of pages of documents
 21 in the last month and a half of discovery, plaintiff says that defendants have no basis to complain
 22 about the timing of the third Fed. R. Civ. P. 30(b)(6) deposition notice and should be ordered to
 23 produce witness(es) to testify about these matters.

24 Defendants argue that Topics 8 and 11-13 of plaintiff's third deposition notice are
 25 duplicative of Topic 6 of plaintiff's second Fed. R. Civ. P. 30(b)(6) notice, for which Huang was
 26 designated to testify. Indeed, Topic 6 of plaintiff's second notice sought testimony about the
 27 "conception, design, structure, research, development, operation, features, testing and functionality
 28 of" Targeted Attack Protection, as well as "identification of the components or modules of source

code responsible for the use of” that product. (DDJR 3, Ex. 2). Plaintiff’s request for an order requiring defendants to produce witness(es) to testify about Topics 8 and 11-13 of plaintiff’s third Fed. R. Civ. P. 30(b)(6) deposition notice is denied. Fed. R. Civ. P. 26(b)(2)(C).

C. Interrogatories 14 and 15

Interrogatory 14 asks defendants to “[i]dentify the first date” that certain technologies listed in the interrogatory “were used, included or implemented with each of the Accused Instrumentalities.” (DDJR 3, Ex. 4). For each of the “Accused Instrumentalities” and technologies defendants identify in response to that interrogatory, Interrogatory 15 asks defendants to “identify the first date the Accused Instrumentality was sold or offered for sale with each technology.” (*Id.*).

At issue are defendants’ second supplemental responses served on September 17, 2015. Finjan contends that those responses are deficient for several reasons. First, Finjan says that defendants only selectively address “certain versions” of products. They apparently are referring to defendants’ response stating that the listed technologies were incorporated into “certain versions” of the Targeted Attack Protection product. (DDJR 3, Ex. 4 at 7). Defendants say that by referring to “certain versions,” they simply meant to note at which point the product first included the identified components. Plaintiff’s request for an order compelling a further supplemental response is denied.

Next, Finjan argues that defendants do not address the Enterprise Protection and Essentials accused products. However, defendants’ responses did address both of those products. (DDJR 3, Ex. 4 at 4-5 and 13). Plaintiff’s request for an order compelling a further supplemental response is denied.

Finally, Finjan complains that defendants’ responses do not say when the accused products first “used” certain technologies. As drafted, Interrogatory 14 asks defendants to identify the first date that certain technologies were “used, included or implemented with” the accused products. Defendants objected to the undefined terms “used,” “included” and “implemented” as vague and ambiguous. Nonetheless, defendants answered the interrogatory based on what they say is their understanding of what was being asked, and identified the dates that certain technologies were

1 first “implemented” or “incorporated” in various products. Plaintiff has not defined “used” or
2 clearly articulated how “used” is substantially different than “implemented” and “incorporated” in
3 defendants’ responses. Plaintiff’s request for an order compelling a further supplemental response
4 is denied.

5 SO ORDERED.

6 Dated: October 26, 2015

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HOWARD R. LLOYD
United States Magistrate Judge

3:13-cv-05808-HSG Notice has been electronically mailed to:

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